SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 492

ALBERT L. ADELMAN and ELEANOR ADELMAN,
Petitioners,

v.

ST. LOUIS FIRE AND MARINE INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court:

Your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was reported in .... Fed. Rep. 2d (....) ..... (Not reported as of this date).

The opinion of the District Court was not reported.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

1. Opinion rendered June 22, 1961.

2. Motion for rehearing, denied August 11, 1961.

3. Jurisdiction to review this case upon Writ of Certiorari is conferred upon this Court by 28 U.S.C. Sec. 1254(1), and Rule 19(b) revised rules of the Supreme Court.

QUESTION PRESENTED

In a civil action in the Court of Appeals below, reviewing the application by the District Court of the law of Maryland to an insurance problem involving a fire loss which arose in Maryland on a policy written in Maryland, did the United States Court of Appeals for the District of Columbia Circuit err in applying the law of the District of Columbia instead of the law of Maryland?

STATUTE INVOLVED

Title 28, Section 1652, United States Code, Annotated.

STATEMENT OF THE CASE

The petitioners became the owners of a home in Silver Spring, Maryland during the year 1948. Their ownership continued and has continued up to the

present date. The insurance policy involved was written on June 15, 1958 to cover any fire loss of the house and contents and certain other coverages not necessary to discuss here.

A fire occurred on the premises on April 16, 1959, and the dwelling was damaged in the sum of $14,369.76, and the contents of the house suffered a loss in the sum of $14,922.37. At the time of the loss there were two policies on the dwelling and two on the contents.

No question was raised by the other insurance companies who readily paid their pro rata shares, but the respondent insurance company indicated to the petitioners that the company might set up a policy defense—that is to say, that it might take the position that because of the other insurance, the respondent company's policy was void. Said company further said that because the premiums for this policy had not been paid, it might not pay the loss.

An informal proof of loss was submitted by the petitioners It did not meet the requirements of a formal proof of loss, and contained no notarization The petitioners received no word from the insurance adjuster as to the determination by the company, but were advised that they could not be told anything because the adjuster had not received any instructions from his company. The petitioners, becoming exasperated by the failure of the insurance company to let them know, employed counsel, who learned that no formal proof of loss had been filed and who prepared and filed such a proof on August 26, 1959. This was after the sixty-day period provided for in the policy.

The insurance company, however, did not reject the claim on the grounds that it was untimely filed, and in fact retained the same without comment.

On October 13, 1959 the attorney for the respondent insurance company denied liability on the policy because the premium was not paid and because additional insurance had been obtained subsequent to the date of the policy in violation of the provisions of the policy.*

The suit was promptly filed and came on for trial before the Court without a jury. The District of Columbia law, as enunciated by the Court of Appeals, was that the failure on the part of the policy holders to file formal proof of loss within the time set by the policy was fatal to their case.

The Maryland law, on the other hand, as enunciated by the Court of Appeals of Maryland, is that where a claim is rejected no formal proof of claim need be made; and, if a proof of claim is untimely filed, the failure on the part of the insurance company to reject the claim on that ground waives the untimeliness of said proof of claim; and, further, even if the claim is rejected *after* the presentation period, such rejection still waives the policy requirement of filing sworn proofs of loss.

From an adverse decision based on the District Court's misconception of the Maryland law your petitioners appealed. The United States Court of Appeals for the District of Columbia Circuit, in a per curiam opinion, applied the law of the District of Columbia and held that the failure to file a formal

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* The letter also contained a third item: "such other defenses as may be available at the time."

Under the rule of ejusdem generis the third item necessarily applies only to defenses of the same nature as those listed, and did not contemplate the failure to file timely proof of claim.

proof of loss within sixty days prevented the recovery by the petitioners.

During the pendency of the appeal the District Court, at the request of the Court of Appeals, had indicated that absent the defense of untimely filing of the proof of loss, it would have found for the petitioners on part of their claim.

Your petitioners filed a petition for rehearing, asserting that the Court of Appeals had failed to apply the Maryland law, but on the contrary had applied the law of the District of Columbia. The petition for rehearing was denied without an oral hearing.

ARGUMENT

I.

The law of Maryland should have been applied

In the trial below it was stipulated that under the facts of this case the law of Maryland controlled. The real estate and personal property were located in Maryland, were covered by a policy issued under Maryland authority, and there was no basis for the application of any law except the law of Maryland to these facts.

Under Title 28, Section 1652, of the United States Code, Annotated, the law as adjudicated by the highest court in Maryland had to be applied.—*Erie Railroad Co.* v. *Harry J. Tompkins,* 304 U.S. 64, 93; 82 Law Ed. 1188.

II.

Under the law of Maryland the rejection of the claim, on grounds other than untimely filing of proof of claim, waived the requirement of the filing of any proof of claim

In *Federal Mutual Fire Insurance Co.* v. *Julien,* 144 Md. 380; 125 A. 229, the highest court of Maryland held that a denial of liability waived the requirement

of filing any proof of loss, even though the rejection occurred after the sixty-day period for presentation.

See also *Rokes* v. *Amazon Insurance Co.*, 51 Md. 512, and the cases cited therein.

III.

If the insurance company accepts an untimely proof of loss without objection, then such retention of the proof of loss without complaint waives any defect of untimely filing

In *Fireman's Insurance Company* v. *Floss*, 67 Md. 403; 10 A. 139, it was held that retention by an insurance company of a sworn proof of loss received without objection, would waive the defects, if any, of such proof of loss.

See also Cooley's Briefs on Insurance, Volume IV, sec. 3480; *Bakhaus* v. *Caledonian Insurance Co.*, 112 Md. 676, 77 A. 310; *Continental Insurance Co.* v. *Burns*, 144 Md. 429, 125 A. 232; and *Citizens Fire Insurance Co.* v. *Doll*, 35 Md. 89 [The *Doll* case was decided in favor of the insurance company, but was predicated on the fact that the rejection of the claim was expressly based on defective proof.]

REASONS FOR GRANTING WRIT

The Court of Appeals has applied the District of Columbia law to a case which should have been decided under Maryland law, contrary to the decisions in this Court. By doing so it has departed from the accepted and usual course of judicial proceedings, so as to call for an exercise of this Court's power of supervision.

The Court of Appeals should have looked only to the Maryland decisions to determine what rule to

apply. It does not matter what rule is supported by the weight of authority, and it is of no consequence that the District of Columbia Court of Appeals holds to the contrary.

It is respectfully submitted that this writ should be granted.

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